BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:	)	
	)	
IUOE, LOCAL 627	)	
	)	
and	)	Case No.: 17-CB-072671
	)	
STACEY M. LOERWALD	)	

POST-HEARING BRIEF OF UNION

COMES NOW IUOE, Local 627 (the "Union"), and submits the following facts, arguments and authorities subsequent to the hearing of October 11, 2018.

BASIC FACTS

The hearing arises out of a compliance specification, limited to a determination of back pay/benefits and related. Although there is no order of the Board or otherwise as to what the back pay period is, it appears that the Board claims it to be November 7, 2011, to August 9, 2012. Tr., p. 22.[1] The Union did a calculation of what Loerwald would have earned during that period (if she had taken all jobs available), assuming that she had been on the out of work list during that time frame. Tr., p. 183; UX3 and attachments; GCX1(g). This was sent to the Board. Tr., pp. 203-204.

[1]References to "Tr., p. _" are references to the respective page of the transcript of the hearing of October 11, 2018, before Region 14, as it proclaims; references to "GCX_" are references to General Counsel Exhibits with the respective number; references to "UX_" are references to the exhibits of the IUOE, Local 627, sometimes called "Respondent", with the respective number.

Subsequently, the method of calculation was explained to the Board agent. Tr., pp. 184-185; UX19, pp. 3-4; GCX1(g). Also, subsequent to the calculation, the Board took the deposition of Mike Stark, business manager for the Union. Tr., p. 110; GCX1(g).

Notwithstanding the foregoing, the Board was determined in its compliance specification not to utilize what actually occurred. Rather, it made estimates based upon work from prior years. Tr., p. 27. This is notwithstanding the fact that the Great Recession had ensued. Tr., pp. 240-241. This is also notwithstanding the fact that the Board's own documents show a vast drop in hours worked between the former and latter years used by the Board, which years preceded the claim herein. Tr., pp. 78, 241; GCX5, 6. Further, the Board did not even use the time which immediately preceded the back pay period, even though the Board's own evidence shows that the work was slower by the time of the back pay period than it had been during the time which the Board utilized. Tr., pp. 82-83; GCX5.

The Board explained that it could not use the year immediately preceding the back pay period because assumed that there may have been discrimination prior to that time, even though the Board decision, affirmed by the Tenth Circuit, does not support that position. Tr., pp. 80-81. Further, such an assumption is contrary to the evidence, which shows Loerwald's problems with the Union began when the new administration took over just before the back pay period

began; Loerwald was in tight with the prior administration, undermining any claim of "may" have been discrimination. Tr., pp. 180, 249, and offer of proof at pp. 166-167, improperly refused by the Board.

As will be shown in the four propositions below, the architectonics of the Union's maximum calculation for the back pay period mirrors reality better than the Board's step through the looking glass; such maximum amount should be reduced by virtue of mitigation that Loerwald failed to take; and the Board's hearing was infused with sufficient discrimination against the Union, error, uncertainty and irregularities so as to undermine any decision herein.

PROPOSITION I: The Architectonics of the Union's Calculation Mirror Reality and Should Be Used as a Maximum Point for Any Back Pay Award Herein.

When determining back pay, the aim is to be as accurate as possible as to what the person would have earned during the period:

> The objective in determining gross backpay is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period, had there not been an unlawful action.
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> ...
>
> In simpler cases, when computations can be speedily prepared, estimates should be avoided.

Section 10540.1[2] It is noted that the methods of computing back pay apply

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[2]The citations to the 10500s herein are to the NLRB Casehandling Manual. The Union notes that the Board uniformly misspells "back pay" as "backpay".

whether the respondent is an employer or a Union. 10546.

Two formulas approved by the Board[3] to figure back pay consider comparable/replacement employees. 10540.3 and 10540.4. The comparable employee method is applicable when there is an employee or group of employees whose earnings prior to the back pay period were comparable to those of the discriminatee. It is particularly applicable when there have been significant changes in conditions during the back pay period. Of course, this method requires records that show the work and earnings of the other employees. Similarly, a replacement employee can be an accurate method of determining back pay. This method is applicable when the discriminatee had a job that was filled by identifiable individuals during the back pay period.

> When applicable, [this method] is easy to understand and apply, relatively easily to document, and could be applied for long backpay periods in which changes in wages or other conditions of employment took place.

10540.4.

> Hiring hall records should provide information concerning which employees were referred and to which employers. Union benefit fund reports might serve to document actual employment of comparable employees during the backpay period.

10546.

As shown above and in the evidence, there is significant variation or change in conditions before, during and after the back pay period. This

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[3]*Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), gives force to the Casehandling Manual, as does the Board's testimony. Tr., pp. 24-25.

includes not only the Great Recession, but the nature of construction work. Tr., p. 28. Also, the hiring hall records are available and in evidence that show which employees were referred and to which employers and how long they worked. UX5, 6, 7, 8. Thus, the architectonics offered by the Union are "easy to understand and apply, relatively easy to document, and [can] be applied for long backpay periods" where there were changes in wages and other conditions of employment. UX3 and inclusions.

The dispatch histories for the two districts for the back pay period are in evidence. UX5, 6, 7 and 8; Tr., pp. 187-192. Similarly, the work history, dispatch history, member qualifications list and health and welfare report for Loerwald are in evidence. UX8, 9, 10, 11; Tr. pp. 193-196. From the dispatch histories of the two districts, the identities of comparable[4] employees can be determined, including Steven Ferrell, Duston Schultz, Jeffrey Shane Nelson, David Church, Stewart Farris, Tifford Graham, and Douglas Hinkle. The qualifications lists, dispatch histories, work histories, and health and welfare reports for each of them is in evidence. UX12, 13, 14, 15, 16, 17, and 18; Tr., pp. 196-203.

From the above documentation, it can be determined, assuming

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[4]It is also necessary to take into account the fact that there were employers that Loerwald could not work for. For example, she was a felon and could not work in an oil refinery, as per the Patriot Act. Or, there were other employers where they had had a bad experience and prohibited her from working there. Tr., pp. 204-206.

Loerwald took every job, what jobs she would have had, how long she would have worked, and how much she would have been paid. Tr., pp. 203-204. This the Union did and informed the Board. Tr., p. 204; UX3.

It was explained at the hearing (and never disputed), going through all the dispatch histories, the jobs that people were sent to, what jobs Loerwald qualified for, who Loerwald was allowed to work for, and what jobs were taken by comparable replacements, where she would have worked, how long she would have worked, and how much she would have earned, assuming she took each job available to her. Tr., pp. 206-236; UX19. The conclusion is that she could have had the Farris job in February, 2012, for 198.5 hours (group X); the Farris job for 40 hours which was forklift work (group V); and the Nelson job beginning in June of 2018 for 130 hours (group X). Tr., pp. 236-239; UX19, p. 2.

Based on the foregoing, the Union submits that the architectonics of its proposed method of calculation <u>does</u> mirror reality, meets the requirements of the Casehandling Manual, and is the basis upon which a maximum back pay calculation can be made.[5]

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[5]In UX3, 19, the Union rolled the wages and benefits into one amount. Based on the exhibits in evidence, it is simple enough to separate them out, if that is what is to be done: 198.5 x (19.00; 5.35; 4.55) + 40 x (22.25; 5.35, 4.55) + 130 x (22.70; 5.45; 4.80) is $7,613 + 1,013 (the expenses amount), altogether results in $8,626 plus interest in wages and expenses; $1,985 plus interest to H&W; and $1,709 plus interest to Pension Fund.

PROPOSITION II: The Architectonics of the Board's Proposal Neither Meet Board Procedures Nor Mirror Reality.

The Board has held that where a respondent offers an alternative formula for determining backpay, the Board must decide which is the "most accurate" method. *Atlantic Veal & Lamb, Inc.,* 355 NLRB 228, fn 5 (2010).

One possible formula includes using averages based on work prior to the unlawful action. 10540.2. However, this method is applicable only when the conditions that existed prior to the unlawful action would have continued unchanged during the back pay period. "If there were significant changes in the availability of work,...other methods may be more appropriate."

Of course, several considerations overarch any method: the comparisons must be reasonable and there must be consideration of reduction in available employment. 10542.1; 10542.5.

The Board began with its position that its calculations do not have to be exact or the best possible, but merely reasonable. Tr., p. 10. Of course, this position is contrary to the *Atlantic Veal* case above: the purpose is to find the best and most accurate method, especially if it is readily available.

The architectonics of the Board's proposal was to average the hours for 2009 and 2010 and <u>assume</u> that these amounts would have applied in the back pay period. Tr., pp. 27-28. This is despite the fact that the Board admits that economic conditions vary in the construction industry, and that there was a 1/3 reduction of hours in the latter year used. Tr., pp. 28, 78.

The Board claims it chose 2009 and 2010 because those were the closest period that they had. Tr., p. 28. However, the Board agent then admitted that there was a closer period–the first ten months in 2011–the months that immediately preceded the back pay period. Tr., p. 80.

The hours for 2009 were 996; for 2010 were 675.5; and for the first ten months of 2011 were 409. Tr., pp. 39-40, 80; GCX5, 6. These numbers indicate that in 2009 Loerwald worked an average of 83 hours per month; in 2010, 56.3; and in 2011 (prior to any discrimination), 40.9. Thus, if the Board had actually used the two years prior to the discrimination, it would have used a monthly average of 45.2[6]; this is instead of the 69.6 figure that it actually used–an increase of 50% over the closer time period.

What is, however, obvious from the numbers (83 hours per month in 2009, 56.3 in 2010, and 40.9 in 2011) is that, not only were there variations from year to year, but that the variations were invariably on a <u>downward</u> trend. The uncontested evidence is that, as a result of the Great Recession,[7] there was a work slowdown beginning in 2009 and extremely in 2010 and 2011. Tr., pp. 240-241. As a result, the use of the earlier years without adjustment would not be an

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[6]This is calculated by taking 675.5 hours for 2010, 409 hours for 2011, and 0 hours for the last two months of 2009 and dividing by the 24 months.

[7]The Board's transcript <u>claims</u> the question was of a "Growth Recession". Tr., p. 240. The Board's (mis)transcription to this oxymoronic reference certainly fits the adjective's second part as to the Board's transcriptor.

accurate reflection of the back pay period. Tr., p. 241. As such, there would have been very few jobs in group V during the slow time. Tr., pp. 257-258.

Based on the foregoing, the Union submits that the Board's method of calculating is fraught with inaccuracy–not taking into account work that was actually done, not taking into the account the work slowdown, and not even utilizing time period closest to the back pay period. As such, the Board's proposed method is contrary to the Casehandling Manual. Rather, the more accurate method proposed by the Union should be utilized; or, at the least, the time periods closest to the back pay period should be used[8] for estimates and averages.

PROPOSITION III: Loerwald Failed to Mitigate Her Damages.

It is fundamental that,

> A discriminatee must make reasonable efforts during the backpay period to seek and hold interim employment.

10558.1. A discriminatee who applies for work one or two times a month is engaged in an inadequate search for work. *Grosvenor Resort,* 350 NLRB 1197, 1201-1202 (2007). The Board compliance officer is required to use reasonable diligence to gather the facts relative hereto. 10558.2.

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[8]This would simply be: multiply the Board's numbers for wages, H&W and pension by .648 and award the result (leaving the job search expenses untouched): ($16,889 - $1, 013) x .648 = $10,288; plus $3,437 x .648 = $2,227; plus $2,949 x .648 = $1,911; or a total of $11,301 plus interest in wages and expenses, and $2,227 plus interest to H&W Fund, and $1,911 plus interest to Pension Fund.

At the hearing, the ALJ ruled that it is unreasonable and inappropriate for a discriminatee to seek employment through the respondent, because why would she take employment where she had been discriminated against? Tr., p. 245. However, such an analysis is contrary to extant controlling law. In *Ford Motor Company v. EEOC,* 458 U.S. 219 (1982), the plaintiffs did not want to go back to work for the defendant that had discriminated against them and the court held that this was a failure to mitigate damages. Indeed, reinstating the relationship between the parties is the "preferred remedy", in the absence of sufficient evidence of hostility so as to render reinstatement inappropriate. *Jackson v. City of Alburquerque,* 890 F2d 225, 232 (10th Cir. 1989); *Marshall v. TRW, Inc., Reda Pump Division,* 900 F2d 1517, 1523 (10th Cir. 1990). In this connection, it should be considered that Loerwald was, in fact, "reinstated" and this occurred before the Board or its ALJ ever got around to making its finding; no hostility arises therefrom.

And, lest it be argued that a simple request by Loerwald to be put back on the OWL with the statement of her phone number would be considered a vain act, as the ALJ ruled at the hearing (Tr., p. 245), consider several things: First, Loerwald went to the Union hall each week knowing she was not on the list. Tr., p. 150. Second, as soon as Loerwald did say she wanted to be on the list and gave up her phone number, she was put on the OWL, which ended the back pay

period. Tr., pp. 171-173. Third, Loerwald's only attempts for work during most[9] the weeks at issue were to go to the Union hall to see if, as she put it, she was "miraculously" put back on the list. Tr., pp. 99, 123; GCX9, 15, 16. It seems less of a miracle for her to have asked to be put on the OWL and to have given her phone number, which is the procedure that had regularly been followed by everyone for years, than to expect to be put on when neither she asked nor did the Union have the phone number to call her with. Tr., pp. 169-171, 242.

The ALJ ruled at the hearing that such a simple thing as asking to be put on the list and giving the phone number was not mitigation. Tr., p. 245. The ALJ never gave any authority for such ruling. Such is also contrary to the Board's witness who testified that Loerwald went each week to register, but was not allowed.[10] However, under the above cases and the facts above set forth, such was a failure to mitigate, especially in light of her claim that expecting a miracle was the only mitigation she exercised for most weeks.

Oliver Cowdery famously did not receive because he "took no thought save it was to ask" to receive his miracle. Loerwald did not even ask. And, as is

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[9]These exhibits show that this is the only action for 36 of the 40 weeks at issue. This would reduce any pack pay by 90%. See also Tr., p. 155.

[10]This is, of course, contrary to both the earlier Board ruling (the failure to re-register Loerwald was tied only to the attorney letter of November 18 that never came to the Union officers' attention) and Loerwald's testimony that she never asked and gave her phone number. Tr., pp. 151-152. The Board representative, did, as appears from her testimony, an inadequate investigation in regard to mitigation. Tr., pp. 94-98.

undisputed, asking and giving a phone number are the only requirements for being on the OWL,[11] and, when she did so, she was placed thereon.

Given that in 90% of the weeks at issue Loerwald did nothing more than go to the Union hall, knowing that she was not on the OWL and never asked to be put on it, and given that, if she had asked, she would have been put on it, then any back pay herein should be reduced by that 90%. This would result[12] in $1,774 plus interest in wages and expenses, $199 plus interest to H&W Fund, and $171 plus interest to Pension Fund, under the Union's architectonics; or, under the Board's, $2,042 plus interest in wages and expenses, $223 plus interest to H&W Fund, and $119 plus interest to Pension Fund. This is the proper amount to be awarded, the amounts in footnotes 5 and 8 being alternatives thereto.

PROPOSITION IV: The Hearing Was Infused with Discrimination Against the Union, Error, Uncertainty and Irregularities, Undermining Any Decision.

The Union raised and preserved in its answer its positions on the "Jesus I know, and Paul I know; but who are you?", issues; that is, that the ALJ does not meet the requirements of the appointments clause of the U.S. Constitution. *Bandimere v. SEC,* 855 F3d 1128 (10th Cir. 2016); *Burgess v. FDIC,* 971 F3d 297 (5th

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[11]There is some question in the earlier decision whether the phone number is a requirement, even though it is in the OWL procedures. However, without a phone number there is no way to contact the person about a job; a person's name on the list person where there is no phone number is functionally the same as not being on the list.

[12]Reducing the wage, H&W and pension numbers, respectively, from footnote 5 above gives: $7,613 x .10 = $761; $1,985 x .10 = $199; and $1,709 x .10 = $171; each plus interest.

Cir. 2017). GCX1(g). The Union also raised this issue at the hearing. Tr., pp. 8-9. The Union was cut off, except that it pointed out that the hearing record is silent on the ALJ's appointment, in general, or assignment to this case, in particular. As to the latter, see 29 CFR § 101.10(a). As such, any decision cannot stand.

Further, the Board, through its advocate, judge and otherwise, showed prejudice and discrimination against the Union, such that the hearing was further infused with error, uncertainty and irregularities, so as to undermine any decision.

The Board's transcript is riddled with errors to its benefit and in discrimination against[13] the Union. See, *e.g.,* Tr., pp. 1, 124, 240, 258.

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[13]Lest the Board should disclaim any responsibility for its clericals and minions, the Board should consider the underlying decision and evidence herein. That decision indicates discrimination based on removing Loerwald from the OWL, which occurred on November 7, 2011. See Part II(5), first two paragraphs, and conclusion of law 2. The detriment from this lasted until November 18, 2011, when Loerwald's attorney provided to the Union's attorney Loerwald's phone number. See findings of fact, Part II(5), last paragraph. It was at that point that Loerwald was not <u>put back</u> on the OWL, which was the discrimination in conclusion of law number 3. Of course, as the evidence at the hearing was, the request and phone number never made it to the Union officers. The Board's decision is premised on the idea that a failure by the clerical personnel, rather than officers, constituted discrimination by the Union. Additionally, the Board decision keyed in on one employee whose name was left on the OWL, despite not having a phone number. 359 NLRB No. 91, p. 767. However, the finding of fact there was that the officers had several times told the clericals to "take off" the name, but the clericals did not. If the Union through its officers is discriminatory because of what was not done by the clericals, then the evidence set forth of the Board's treatment, through those lower in federal service, demonstrates the same.

Throughout the hearing the inadequacy of the Board's facility was addressed by both the Union and the ALJ, numerous times, although always with an attitude that it was the Union's fault. See, *e.g.,* Tr., pp. 57, 61-62. When the Union pointed out that it could not hear the Board witness, the ALJ indicated that it would "ask her to speak up", but did not. Tr., p. 57. Only pages later did he actually do so. Tr., p. 59.

It came up several times at the hearing whether the major underlying ULP in the case was, as the Board put it, that Loerwald was discriminatorily removed from the OWL, or whether, as the Union pointed out, it was a question of her discriminatorily not being replaced on the OWL. As shown above, the former incident occurred on November 7 and the latter occurred on November 18, with the back pay period running from November 7 to August 9. So, of the 9 months and 2 days, 11 of the back pay days[14] related to the former and almost nine months, to the latter. Notwithstanding, the ALJ repeatedly allowed the Board to testify to the former, as though that were the major thing and prohibited the Union from referring to the latter, which was, in truth, the major thing. See, *e.g.,* Tr., pp. 50, 67, 99-100.

Of course, examination of witnesses should consist of the advocate asking a question and the witness answering. 29 CFR §§ 101.16(c), 101.10; FRE 611; Tr.,

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[14]And, as the referral documentation shows, there were no referrals in that 11 day period out of either district that Loerwald could have filled; thus, all the lost time work was during the failure to re-register period. UX5, 7.

p. 70. The ALJ, however, without objection by the Board advocate, required the Union to "stick to questions", while the Board advocate was allowed to make statements before asking questions, with no *sua sponte* admonition from the ALJ and even overruling objections on the point by the Union. See, *e.g.,* Tr., pp. 66, 70, 74, 116, 176, 245-249. Again, the ALJ treated the goose and gander differently.

At one point, the Union was reprimanded for going to the witness chair to show the witness a document; the ALJ ruled that he had to grant permission for such. Tr., pp. 79-80. However, the Board advocate thereafter went to the witness chair multiple times without the correlative *sua sponte* intervention by the ALJ. See, *e.g.,* Tr., pp. 107, 117, 249. Again, goose and the gander are treated differently.

Perhaps the second most egregious act which occurred during the hearing was the assault and battery committed by the Board advocate upon the Union witness. Tr., p. 249. Compare *Fisher v. Carrousel Motor Hotel, Inc.,* 424 SW2d 627 (Tex. 1967), wherein Fisher, a mathematician with NASA, went to a hotel restaurant for an invited luncheon, buffet style. As Fisher stood in line with the others and was about to be served, the restaurant manager came up and snatched the plate from Fisher's hand. The court held that such was an actionable assault and battery. In the instance here, the witness was holding paperwork and was testifying, at which point the Board's advocate approached the witness

(without ALJ permission) and aggressively snatched the paperwork from the witness' hand. Despite objection of the Union, the ALJ neither ruled on the objection nor *sua sponte* took remedial or cautionary measures. Again, when the Board's actions are compared to the Union's actions at the hearing, the differential treatment is obvious to the Union's detriment.

One of the issues at the hearing had to do with the credibility of the Board's sponsoring witness. A part concerned GCX3, 4–Loerwald's experience records. The Board's witness testified that these documents came from the Union. Tr., pp. 30-32, 87-88. However, the facts and other information indicated that it was not the complete document, to which the Union objected, as the complete document would reveal the truth. Tr., p. 32. FRE 106. The ALJ then testified for the witness that this is all that was received and accepted it as being from the Union. Tr., p. 33.

Of course, despite the big to-do[15] with the Board's ALJ and witness testifying with certainty about this, Loerwald admitted that the handwriting as to the page numbers, etc., was hers and that she faxed the documents to the Board, not the Union. Tr., pp. 167-168. Again, the ALJ stifled examination by the Union, refused production of the whole document as allowed by the evidence rules,

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[15]At the hearing there was a to-do about the word "to-do". Tr., pp. 152-153. The ALJ would not allow its use. Merriam-Webster Online notes its use in c. 1576. This is one of the several times the ALJ allowed the witness (even agreeing himself) to evade basic questions by denying simple English, something he never did except to the Union's detriment.

confirmed the untrue testimony of his colleague in the federal service, and was wrong. Similarly, the ALJ repeatedly aided the witness in answering and evading questions. See, *e.g.,* Tr., pp. 71-75, 84, 99-101, 151-152. The Union was repeatedly denied the ALJ to make objections. Tr., pp. 100-101, 255. The Board's advocate was allowed to make rulings. Tr., p. 165. The ALJ testified for his colleague in federal service, the witness, in overruling the Union's objection. Tr., p. 33.

It should be pointed out that in all of these instances, not only was the Board treated differently from the Union, but the Union was treated in the negative in comparison to the ALJ's colleagues in federal service on each occasion.

Based on the foregoing, it appears that the hearing was infused with discriminatory treatment against the Union, error, uncertainty, and irregularities, not only by the Board's minions, but its ALJ, to the extent that any decision herein would be tainted.

CONCLUSION

Based on the foregoing, the Union submits that its method of computation of back pay is in accordance with Board's procedures, mirrors reality, and should be utilized, subject to reduction for failure to mitigate by Loerwald, and that the Board should conduct a proper hearing through a neutral and impartial decision maker.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 15 day of November, 2018, a true and correct copy of the above and foregoing was emailed to:

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